Tai Choi Yu v Ian Chin Hon Chong

HIGH COURT (MIRI) — SUIT NO 22–129 OF 1998 (MIRI)
SULAIMAN DAUD JC
9 FEBRUARY 2002

Civil Procedure *— Writ of summons — Extension of — First extension of writ granted under un-amended O 6 r 7(2) — Amendment to O 6 r 7(2) by Rules of the High Court (Amendment) 2000 (PU (A) 342/2000) — Whether application for extension of writ issued and renewed before amendment to O 6 r 7(2) subject to the new provisions of O 6 r 7(2) & (2A) — Whether new O 6 r 7(2) & (2A) have retrospective effect — Rules of the High Court O 6 r 7(2) & (2A)*

Civil Procedure *— Writ of summons — Extension of — First extension of writ granted under un-amended O 6 r 7(2) — Writ not served — Application for second extension dismissed — Plaintiff's action unsustainable — Whether hardship to defendant if writ extended outweighed hardship to plaintiff if extension disallowed*

This was an appeal by the plaintiff against the decision of the learned senior assistant registrar dismissing his application to extend the validity of the writ of summons in this action ('the writ'). The writ, which was issued on 1 October 1998 was extended once by the learned senior assistant registrar for a period of 12 months from 1 October 1999 to 30 September 2000. This appeal related to the dismissal of the application for the second extension. With the amendment to the Rules of the High Court 1980 ('the RHC') vide PU(A) 342 dated 21 September 2000, O 6 r 7(2) which dealt with the issue of writ was revoked and substituted with the new r 7(2) and 7(2A). The new r 7(2A) expressly provided for the affidavit supporting the application to show that efforts had been made to serve the defendant within one month of the date of issue of the writ and that efforts had been made subsequent thereto to effect service. The old rule relating to the renewal of writ in force before 22 September 2000, then O 6 r 7(2), was silent with regard to the grounds on which the court was to exercise its power for such extension. The question was whether the renewal of the present writ, which was issued and renewed before the coming into force of the said amendment was subject to the new provisions. In other words whether the new O 6 r 7(2) and (2A) of the RHC had retrospective effect.

Held:

(1) The new O 6 r 7(2) and (2A) of the RHC should not be given a retrospective effect. The new rules created a new obligation or imposed new duty on the part of the applicant to satisfy the court by way of affidavit evidence that efforts had been made to serve the defendant within one month of the date of issue of the writ. To give the new O 6 r 7(2) and (2A) of the RHC a retrospective operation would definitely impair the applicant's existing right

A and obligations as no such requirement were provided under the old rule (see p 525B–C).

(2) On the facts, the court could not see how the plaintiff's action herein was subjudice the appeal of the 1990 suit. The indorsements in the writ merely state that the plaintiff's claim was B for damages for libel contained in a written judgment dated 9 October 1997 in respect of the 1990 suit delivered and published by the defendant and that the defendant sought for an order for certain part of the judgment to be expunged therefrom. Further the plaintiff had not even filed the statement of claim for the court to make a finding whether the plaintiff's action herein C was in fact subjudice the said appeal. In any event it was not for the plaintiff to determine whether the subject matter of the writ was subjudice so as to justify his failure to serve the writ to the defendant within the validity period (see p 526C–E).

(3) The various appeal referred to by the plaintiff were in fact appeal D against the order or decision of the defendant in the exercise of his judicial function. Therefore, there was no basis in the plaintiff's contention that the service of the writ should not be effected to maintain the status quo pending the disposal of the appeal. Moreover it was for the court and not the litigant to decide whether any proceedings should be stayed pending the disposal of E other proceedings related thereto. In the circumstances it was the court's finding that the two grounds advanced by the plaintiff did not constitute 'good reason' for not effecting the service of the said writ during its validity period (see p 526F–G).

(4) It was also clear from the indorsement on the writ that the basis F of the plaintiff's claim was in respect of an alleged libel contained in the defendant's written judgment in the 1990 suit. It was beyond any shadow of doubt that a judge acting judicially is not, by virtue of s 14 of the Courts of Judicature Act 1964, liable to be sued in any civil court for any act done by him in the discharge of G his judicial duty. In view of the immunity conferred on a judge by the aforesaid provision, the plaintiff's action against the defendant was clearly unsustainable and was doomed to fail right from the outset. By this reason thereof, the court found that the hardship to the defendant if the writ was extended would far outweigh the hardship to the plaintiff if the extension was disallowed (see H pp 524A–B, 526G–H, 527A–B).

Obiter:

An amicus curiae is defined as a friend of the court, being a person who voluntarily or on invitation of the court, and not on the I instruction of any party helps the court in any judicial proceedings. In the instant case, notwithstanding that the senior federal counsel had volunteered to help the court in her capacity

as amicus curiae, she could only be heard if invited by the court to do so. However, any suit against a judge for an alleged libel contained in his written judgment would undoubtedly involved a matter of public interest. Having considered the subject matter of the suit and the fact that the senior federal counsel was invited by the learned senior assistant registrar in the hearing before him, the court did not see any valid reason to object the presence of the senior federal counsel as amicus curiae to appear and be heard in this application. The presence of the senior federal counsel at the hearing would not in any way be prejudicial to the plaintiff's case (see pp 523I–524C).

[Bahasa Malaysia summary

Ini adalah satu rayuan oleh plaintif terhadap keputusan penolong kanan pendaftar yang menolak permohonan plaintiff untuk melanjutkan kesahihan writ saman dalam tindakan ini ('writ tersebut'). Writ tersebut, yang telah dikeluarkan pada 1 Oktober 1998 telah dilanjutkan sekali oleh penolong kanan pendaftar yang arif untuk satu tempoh 12 bulan daripada 1 Oktober 1999 hingga 30 September 2000. Rayuan ini adalah tentang penolakan permohonan untuk lanjutan kedua. Dengan pindaan kepada Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') melalui PU (A) 342 bertarikh 21 September 2000, A 6 k 7(2) tentang pengeluaran writ telah dibatalkan dan digantikan dengan k 7(2) dan (2A) yang baru. Kaedah 7(2A) yang baru dengan nyata memperuntukkan tentang afidavit yang menyokong permohonan untuk menunjukkan bahawa usaha-usaha telah dilakukan untuk menyampaikan kepada defendan dalam tempoh satu bulan daripada tarikh writ dikeluarkan dan usaha-usaha tersebut telah dilakukan agar penyampaian tersebut terlaksana. Kaedah yang lama tentang pembaharuan writ yang berkuatkuasa sebelum 22 September 2000, iaitu A 6 k 7(2), tidak menyebutkan apa-apa tentang alasan-alasan untuk mahkamah melaksanakan kuasanya untuk lanjutan sedemikian. Persoalannya adalah sama ada pembaharuan writ sekarang, yang telah dikeluarkan dan diperbaharui sebelum penguatkuasaan pindaaan tersebut adalah tertakluk kepada peruntukan yang baru. Dalam erti kata lain sama ada A 6 k 7(2) dan (2A) KMT akan diberikan satu kesan kebelakangan.

Diputuskan:

(1) Aturan 6 k 7(2) dan (2A) yang baru KMT tidak sepatutnya memberikan satu kesan kebelakangan. Adalah nyata bahawa kaedah-kaedah baru ini membentuk satu obligasi atau meletakkan satu kewajipan yang baru di pihak pemohon untuk memuaskan mahkamah melalui keterangan afidavit bahawa usaha-usaha telah dibuat untuk menyampaikan ke atas defendan dalam tempoh satu bulan daripada tarikh writ dikeluarkan. Untuk memberikan A 6

k 7(2) dan (2A) KMT satu operasi yang kebelakangan semestinya akan mengurangkan hak dan obligasi pemohon yang sedia ada kerana tiada keperluan sepertinya diperuntukkan dalam kaedah lama (lihat ms 525B–C).

(2) Berdasarkan fakta-fakta berikut, mahkamah tidak dapat melihat bagaimana tindakan plaintif di sini adalah subjudice rayuan untuk guaman 1990 itu. Pengindorsan dalam writ semata-mata menyatakan bahawa tuntutan plaintif adalah untuk ganti rugi untuk libel yang terkandung di dalam satu penghakiman bertulis bertarikh 9 Oktober 1997 berhubung guaman 1990 yang telah diberi dan diterbitkan oleh defendan dan bahawa defendan telah memohon satu perintah agar sebahagian daripada penghakiman tersebut dipadamkan daripadanya. Tambahan pula plaintif tidak langsung memfailkan pernyataan tuntutan untuk mahkamah membuat penemuan sama ada tindakan plaintif memang subjudice rayuan tersebut. Dalam apa keadaanpun, ia bukan untuk plaintif menentukan sama ada perkara pokok writ tersebut adalah subjudice untuk menjustifikasikan kegagalan beliau menyampaikan writ tersebut kepada defendan dalam tempoh yang sah (lihat ms 526C–E).

(3) Pelbagai rayuan yang dirujuk oleh plaintif pada hakikatnya adalah rayuan terhadap perintah atau keputusan defendan dalam menggunakan fungsi kehakiman beliau. Oleh itu, tiada asas dalam hujah plaintif bahawa penyampaian writ tersebut tidak sepatutnya dilaksanakan untuk mengekalkan status quo sementara menunggu rayuan selesai. Bahkan ia adalah untuk mahkamah dan bukan litigan untuk memutuskan sama ada apa-apa prosiding patut digantung sementara menunggu prosiding-prosiding yang berkaitan selesai. Dalam keadaan berikut, adalah penemuan mahkamah bahawa dua alasan yang dikemukakan oleh plaintif tidak membentuk 'good reason' untuk tidak melaksanakan penyampaian writ tersebut dalam tempoh sahnya (lihat ms 526F–G).

(4) Adalah juga jelas daripada pengindorsan atas writ tersebut bahawa asas tuntutan plaintif adalah berhubung dengan dakwaan libel yang terkandung dalam penghakiman defendan dalam guaman 1990 tersebut. Ia adalah melampaui apa-apa bayangan keraguan bahawa seorang hakim yang bertindak dalam fungsi kehakimannya tidak akan, menurut s 14 Akta Kehakiman Mahkamah 1964, bertanggunggan dalam mana-mana mahkamah sivil untuk apa-apa tindakan yang dibuat oleh beliau tatkala dalam tugas kehakiman beliau. Memandangkan kekebalan yang diberikan ke atas seorang hakim melalui peruntukan tersebut, tindakan plaintif terhadap defendan dengan nyata tidak boleh dikekalkan dan sememangnya akan gagal. Oleh sebab itu, mahkamah mendapati kesukaran defendan jika writ tersebut dilanjutkan akan melebihi kesukaran plaintif jika lanjutan tersebut tidak dibenarkan (lihat ms 524A–B, 526G–H, 527A–B).

Obiter:

Seorang amicus curiae ditafsirkan sebagai rakan mahkamah, seseorang yang secara sukarela atau atas jemputan mahkamah, dan bukan atas arahan mana-mana pihak membantu mahkamah dalam apa-apa prosiding kehakiman. Dalam kes ini, meskipun peguam kanan persekutuan telah secara sukarela ingin membantu mahkamah dalam kapasiti beliau sebagai amicus curiae, beliau hanya boleh didengar jika dijemput oleh mahkamah untuk berbuat demikian. Namun begitu, apa-apa guaman terhadap seorang hakim untuk dakwaan libel yang terkandung di dalam penghakiman bertulis beliau akan tanpa sebarang keraguan melibatkan satu perkara berkepentingan awam. Setelah mempertimbangkan perkara pokok guaman tersebut dan hakikat bahawa peguam kanan persekutuan telah dijemput oleh penolong kanan pendaftar yang arif untuk didengar di hadapan beliau, mahkamah tidak melihat apa-apa sebab yang sah untuk membantah kehadiran peguam kanan persekutuan tersebut sebagai amicus curiae untuk hadir dan didengar dalam permohonan ini. Kehadiran peguam kanan persekutuan di perbicaraan tersebut tidak akan dalam apa cara pun memprejudiskan kes plaintif (lihat ms 523I–524C).]

Notes

For a case on extension of writ of summons, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) para 6578.

Cases referred to

Battersby & Ors v Anglo-American Oil Co Ltd & Ors [1945] 1 KB 23 (refd)

Easy v Universal Anchorage Co Ltd [1974] 1 WLR 899 (refd)

Hamid bin Hassan, Re Application by; Hamid bin Hassan v Returning Officer, Karak & Ors [1979] 2 MLJ 183 (refd)

Jason Textile Industries Pte Ltd, Official Receiver, Liquidator of v QBE Insurance (International) Ltd [1989] 1 MLJ 1 (refd)

Kleinwort Benson Ltd v Barbak Ltd [1987] 2 All ER 289 (refd)

Lloyd Triestino Societa v Chocolate Products (M) Sdn Bhd [1978] 2 MLJ 27 (refd)

Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 MLJ 292 (refd)

Ye Bon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 14, (1)

Rules of the High Court 1980 O 6 r 7(2), (2A)

A *Tai Choi Yu* (*Tai Choi Yu*) for the plaintiff.
Azizah bte Hj Nawawi (Senior Federal Counsel, Attorney General's Chambers) as amicus curiae.

Sulaiman Daud JC: This is an appeal by the plaintiff against the decision of the learned senior assistant registrar ('SAR') dismissing his application to B extend the validity of the writ of summons in this action ('the writ'). The writ which was issued on 1 October 1998 was extended once by the learned SAR for a period of 12 months from 1 October 1999 to 30 September 2000. This appeal relates to the dismissal of the application for the second extension.

The said writ is indorsed with the concise nature of the plaintiff's claim C which read as follows:

> The plaintiff's claim is for:
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> (1) damages for libel contained in a written judgment dated 9 October 1997 in Miri High Court Suit No MR 26 of 1990 delivered and/or published by the defendant;
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> (2) an order that the impugned part and/or portion of the impugned judgment numbering eight (8) pages in all be expunged and/or expurgated and/or excluded from the said expugned judgment;
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> (3) interest on the damages at the rate of 8%pa from the date herein until final settlement or at such rate and for such period of time as the court deems just; and
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> (4) such other relief as the court deems just.

From the aforesaid indorsement it is obvious that the plaintiff's claim against the defendant is for damages for an alleged libel contained in the written judgment of the defendant in respect of the Miri High Court Suit F No MR 26 of 1990 ('the 1990 Suit').

The application was ex parte but at the very outset of the hearing, Pn Azizah Hj Nawai, a senior federal counsel of the Attorney General's Department appeared before the court. Mr Tai Choi Yu, the plaintiff, objected to her presence at the hearing on the ground that the application was ex parte and that she was not retained by the defendant to act on his G behalf. He further argued that a judge is not a public servant and therefore cannot be represented by the senior federal counsel in this proceedings. Puan Azizah explained that she was not acting for the defendant but only appeared as *amicus curiae*. She also informed the court that she was allowed to appear in such a capacity in the hearing before the learned SAR. To H justify her presence as *amicus curiae*, she argued that the application involved a matter of public interest where a judge is being sued for an alleged libel contained in his written judgment. The learned senior federal counsel also cited the case of *Re Application by Hamid bin Hassan; Hamid bin Hassan v Returning Officer, Karak & Ors*[1979] 2 MLJ 183, where the trial judge in an ex parte application allowed a senior federal counsel to appear I in that proceedings as *amicus curiae* upon the invitation of the court.

Who is an *amicus curiae*? In P Ramanatha Aiyar's *The Law Lexicon* (2nd Ed, 1997), *amicus curiae* is defined as a friend of the court, being a person

who voluntarily or on invitation of the court, and not on the instruction of any party helps the court in any judicial proceedings. In the instant case notwithstanding that the senior federal counsel has volunteered to help the court in her capacity as *amicus curiae*, however, in my view she can only be heard if invited by the court to do so. It is beyond any shadow of doubt that a judge acting judicially is not, by virtue of s 14 of the Courts of Judicature Act 1964 ('the CJA'), liable to be sued in any civil court for any act done by him in the discharge of his judicial duty. I therefore agree with the senior federal counsel that any suit against a judge for an alleged libel contained in his written judgment will undoubtedly involved a matter of public interest. Having considered the subject matter of the suit and the fact that the senior federal counsel was invited by the learned SAR in the hearing before him, I did not see any valid reason to object the presence of the senior federal counsel as *amicus curiae* to appear and be heard in this application. I therefore overruled the plaintiff's objection and invited the senior federal counsel to appear in the proceedings as such. I am also of the view that the presence of the senior federal at the hearing will not in any way be prejudicial to the plaintiff's case.

I now consider the substantive issue raised in the appeal.

The law applicable

With the amendment to the Rules of the High Court 1980 vide PU(A) 342 dated 21 September 2000, O 6 r 7(2) which deals with the issue of writ was revoked and substituted with the new r 7(2) and 7(2A). The new r 7(2A) expressly provides for the affidavit supporting the application to show that efforts have been made to serve the defendant within one month of the date of issue of the writ and that efforts have been made subsequent thereto to effect service. The old rule relating to the renewal of writs in force before 22 September 2000, then O 6 r 7(2), is silent with regard to the grounds on which the court is to exercise its power for such extension. The question is whether the renewal of the present writ which was issued and renewed before the coming into force of the said amendment is subject to the new provisions. In other words, whether the new O 6 r 7(2) and (2A) have to be given a retrospective effect.

On the point of retrospectivity, Lord Brightman in the Privy Council case of *Ye Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1, made the following observation:

> ... there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already passed.

In *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292, Gopal Sri Ram JCA, having examined the authorities on the issue of retrospectivity, concluded, at p 297, as follows:

> In our judgment, the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, *prima facie* that law must be construed as having prospective effect only, unless there is clear indication in the enactment that it is in any event to have retrospectivity.

On the facts of the present case in my judgment, the new O 6 r 7(2) and (2A) should not be given a retrospective effect. It is obvious that the new rules create a new obligation or imposed a new duty on the part of the applicant to satisfy the court by way of affidavit evidence that efforts have been made to serve the defendant within one month of the date of issue of the writ. To give the new O 6 r 7(2) and (2A) a retrospective operation will definitely impair the applicant's existing right and obligations as no such requirements were provided under the old rule.

There are numerous authorities on the principles to be applied by the court on an application for the extension of the validity, including renewal of a writ under the old O 6 r 7.

In *Lloyd Triestino Societa v Chocolate Products (M) Sdn Bhd* [1978] 2 MLJ 27, the Federal Court adopted with approval the observation made by Lord Goddard LJ (as he then was) in *Battersby & Ors v Anglo-American Oil Co Ltd & Ors* [1945] 1 KB 23, at p 32–33, that:

> ... even when an application for renewal of a writ is made within 12 months of the date of issues, the jurisdiction given by the rule ought to be exercised with caution. It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course on an application which is necessarily made ex parte. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the court is satisfied that good reasons appear to excuse the delay in the service...

The requirement of 'good reason' to justify such an extension was also adopted in *Easy v Universal Anchorage Co Ltd* [1974] 1 WLR 899, where Lord Denning MR made the following observation:

> The only principle is that a writ is not to be renewed except for good reason. That appears from the cases starting with the judgment of Megaw J in *Heaven v Road and Rail Wagons Ltd* [1965] 2 QB 355 and followed in this court in *Baker v Bowketts Cakes Ltd* [1966] 1 WLR 861 and *Jones v Jones* [1970] 2 QB 576.

In *Official Receiver, Liquidator of Jason Textile Industries Pte Ltd v QBE Insurance (International) Ltd* [1989] 1 MLJ 1, the Singapore Court of Appeal held that in an application for renewal, the case has to be looked at as a whole and all the circumstances considered in deciding whether there are good reasons for extending the validity of the writ.

Another relevant consideration in exercising the discretion whether to grant or refuse the renewal of a writ is the balance of hardship to the plaintiff if extension is refused and hardship to the defendant if it is allowed. This principle was adopted by the House of Lord in *Kleinwort Benson Ltd v Barbak Ltd* [1987] 2 All ER 289, where Lord Brandon said at p 300:

> The decision whether an extension should be allowed or disallowed is a discretionary one for the judge who deals with the relevant application. *Jones v Jones* shows that, in exercising that discretion, the judge is entitled to have regard to the balance of hardship. In doing so, he may well need to consider whether allowing an extension will cause prejudice to the defendant in all the circumstances of the case.

I turn now to apply the aforesaid principles to the present case. The plaintiff gave two main grounds to justify the application for the extension. Firstly it is contended that the subject matter of the writ herein which relate to an alleged libel contained in the written judgment of the 1990 Suit is subjudice the appeal of the said suit which is still pending before the Court of Appeal. Secondly in view of the various appeals pending before the Court of Appeal, including his conviction for contempt of court by the defendant, the plaintiff deem it fit for the status quo concerning him and the defendant be maintained until the disposal of all such appeal.

With regard to the first ground, based on the evidence available before the court, I cannot see how the plaintiff's action herein is subjudice the appeal of the 1990 Suit. The indorsements in the writ merely state that the plaintiff's claim is for damages for libel contained in a written judgment dated 9 October 1997 in respect of the 1990 Suit, delivered and published by the defendant, and that the defendant sought for an order for certain parts of the judgment to be expunged therefrom. Further, the plaintiff had not even filed the statement of claim for the court to make a finding whether the plaintiff's action herein is in fact subjudice the said appeal. In any event, it is not for the plaintiff to determine whether the subject matter of the writ is subjudice so as to justify his failure to serve the writ to the defendant within the validity period.

The second ground for withholding the service of the writ is undoubtedly without any merit. The various appeals referred to by the plaintiff are in fact appeals against the order or decision of the defendant in the exercise of his judicial function. Therefore, there is no basis in the plaintiff's contention that the service of the writ should not be effected to maintain the status quo pending the disposal of the appeal. Moreover, it is for the court and not the litigant to decide whether any proceedings should be stayed pending the disposal of other proceedings related thereto. In the circumstances, it is my finding that the two grounds advanced by the plaintiff do not constitute 'good reason' for not effecting the service of the said writ during its validity period.

It is also clear from the indorsement on the writ that the basis of the plaintiff's claim is in respect of an alleged libel contained in the defendant's written judgment in the 1990 Suit. It is without a doubt that the said judgment was written and delivered by the defendant in the discharge of his judicial function as the trial judge in the said suit. The CJA, in s 14(1), provide for the protection of a judge as follows:

> No judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limit of his jurisdiction, nor shall any

A order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.

In view of the immunity conferred on a judge by the aforesaid provision, the plaintiff's action against the defendant is clearly unsustainable and is doomed to fail right from the outset. It is also my finding, by reason thereof, B that the hardship to the defendant, if the writ is extended, would far outweigh the hardship to the plaintiff if the extension is disallowed.

For all the above reasons, I dismissed the appeal. There is no order as to costs.

Order accordingly.

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Reported by Peter Ling

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